No. 17-333

In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellees.

On Appeal from the United States District Court for the District of Maryland

REPLY BRIEF

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INTRODUCTION

All nine Justices agreed in *Vieth* that partisan gerrymandering can violate the Constitution. The central question presented here is whether the Court has the Article III authority to do anything about it.

It does. Plaintiffs' First Amendment challenge to Maryland's single-district partisan gerrymander is justiciable under the same standards that govern all First Amendment challenges in cases involving voting and elections. Thus, when a State deliberately retaliates against its citizens for their past voting behavior by diluting their votes so significantly that it eviscerates their political opportunity—and the burden would not have been imposed otherwise—the targeted voters have a First Amendment claim, and Article III courts have jurisdiction to resolve it. And if any case fits that mold, this is it.

The State and its amici offer a mishmash of disconnected rejoinders. Yet almost none bear on the issue of justiciability—that is, on whether the burdens of partisan gerrymandering are judicially identifiable according to reasoned, manageable standards.

Nor are the State's merits arguments persuasive. Enforcement of the First Amendment in this case will not "outlaw" all politics in redistricting; it will forbid only deliberate efforts to dilute citizens' votes because of the way they voted in the past. This is a difference of kind, not degree; most political considerations remain entirely permissible.

Nor do we argue that plaintiffs' political success *before* the redistricting entitles them to continued political success *after* the redistricting. The point is only that plaintiffs have a right not to be singled out

for disfavored treatment on the basis of their party preference or successful past support of Republican candidates for office.

For more than 200 years, our Nation has striven to "demonstrat[e] to the world how democracy works." *Vieth* v. *Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring). Partisan gerrymandering, an admitted attempt to "rig[] elections," is at war with that aspiration. *Ibid.* It is also irreconcilable with the First Amendment's essential guarantee that no State may punish its citizens for their political beliefs.

ARGUMENT

A. Article III courts are capable of detecting constitutional burdens in cases like this

1. The intended consequences of partisan gerrymandering are real, identifiable, and undisputed. First and foremost, a gerrymander dilutes opposition votes, with the purpose of dictating electoral outcomes in the targeted district. See Appellants' Br. 14-19, 40-41. This, in turn, depresses political support for the opposition party. See Appellants' Br. 19-20; J.S. App. 71a (Niemeyer, J., dissenting).

Identifying these intended burdens entails a common-sense assessment of a gerrymander's practical effects. As we explained (Appellants' Br. 37), it requires an evaluation of how the map has affected the distribution of voters throughout the district, whether those changes have depressed voter engagement and turnout, and whether they have probably altered (or probably will alter) the outcomes of any elections. The evidentiary tools necessary for this kind of assessment are neither complex nor elusive: They include the tools that gerrymanderers themselves use to ensure their own success.

This kind of pragmatic assessment of evidence would be at home in any Article III lawsuit. In the election-law context, in particular, this Court has recognized that election regulations can "burden[] the availability of political opportunity" by, among other things, making it "more difficult to recruit and retain" supporters or secure "media publicity and campaign contributions" and making voters "less interested in the campaign." *Anderson* v. *Celebrezze*, 460 U.S. 780, 792-793 (1983). Thus, according to the Court's cases, a law's infliction of a particular "political disadvantage" that "disfavor[s] a [particular] class of candidates" (*Cook* v. *Gralike*, 531 U.S. 510, 523, 525 (2001)) is an identifiable burden.[1]

2. The State asserts that gerrymandering does not inflict any First Amendment burdens at all. As the State sees it (Br. 29), "[a]ny member of a political minority may still vote in elections, campaign for preferred candidates, petition her representative, and access constituent services," even if she lives in an openly gerrymandered district. Because partisan gerrymandering does not "impact who is on the ballot, who can cast a vote, or when votes may be cast" (State Br. 30), gerrymandering does not impose any cognizable burden on the right to vote. Accord Freedom Partners Amicus Br. 8-10.

This line of reasoning ignores our theory. As the district court explained, gerrymandering "*indirectly* imping[es] on the direct rights of speech and association by retaliating against citizens for their exer-

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[1] The State puzzlingly asserts (Br. 2 n.1) that nearly all factual matters in this case are "not yet ripe for appellate review." That is wrong. The entire record was before the district court, and a court abuses its discretion when it arbitrarily disregards or clearly misconstrues probative evidence.

cise." J.S. App. 101a (emphasis added). A claim sounding in retaliation is distinct from a claim that the State is directly restricting First Amendment rights, which might be the case if the State forbade Republicans from voting altogether. On the theory presented here, plaintiffs must prove that the State "penalized" Republicans for their *past* "exercise of protected speech and association rights" (*Rutan* v. *Republican Party*, 497 U.S. 62, 65, 77 n.9 (1990)), not that it is directly and affirmatively restricting their current or future exercise. That is exactly what we have done.

Casting a ballot for one candidate over another is perhaps the most fundamental and important expression of a citizen's political beliefs and ideas. Cf. *Doe* v. *Reed*, 561 U.S. 186, 195 (2010) (signing a referendum petition "expresses a particular viewpoint" protected by the First Amendment). "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian* v. *Republican Party*, 479 U.S. 208, 214 (1986) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). And among the means of "furthering [a party's] political and organizational goals" protected by the First Amendment is citizens' "casting their votes for some or all of the Party's candidates." *Id.* at 215.

It follows that a burden deliberately imposed upon particular citizens *because of* the views reflected in their voting histories and party affiliations is a burden upon protected speech. Partisan gerrymandering inflicts such a burden. As the Court recognized in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), district lines may be drawn "to minimize or cancel

out the voting strength of racial or political elements of the voting population." *Id.* at 751 (quoting *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965)). Accord *id.* at 754 (lines may be drawn so that the "voting strength" of particular "political groups" is "invidiously minimized"). Thus, the right to vote can be burdened, not only "by an absolute prohibition on casting a ballot," but also "by a dilution of voting power" because of past views expressed. *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969).

In the words of the 12 States appearing as amici, this burden is "obvious": "If the party in power considers voting history or party affiliation when drawing a district line," it does so to "disfavor the other party and to 'punish' voters of the other party by making it harder for them to win seats." Michigan Amicus Br. 9.

This case proves the point. The 2011 gerrymander inflicted vote dilution so significant that it made it effectively impossible for Republicans to win elections in the Sixth District, thus burdening Republicans' availability of political opportunity. See J.S. App. 53a, 69a (Niemeyer, J., dissenting). Indeed, the gerrymander was so successful that it has as a practical matter "dictate[d] electoral outcomes" (*Gralike*, 531 U.S. at 523) in the Sixth District since 2012, as was its goal: Whereas the chances of a Republican victory were 99.7%-100% in 2010, the chances of a Democratic victory were 92.5%-94.0% in 2012 onward. See 3JA826; 4JA887, 1107-1110, 1124. The State's own experts agree that the vote dilution deliberately visited upon plaintiffs and their fellow Republicans placed them at a clear political disadvantage, burdening their political opportunity be-

cause of the way they voted in the past. See 1JA255-256; 3JA827.[2]

And the State's contrary position proves too much. By its rationale, Maryland law (even its constitution) could provide that redistricting maps must be drawn to ensure maximum dilution of Republican votes, subject only to the limits of the one-person-one-vote rule and Section 2 of the Voting Rights Act. Cf. Oral Arg. Tr. at 19-22, 26-28, *Gill* v. *Whitford*, No. 16-1161. A provision of this kind would not prevent citizens from "campaign[ing] for preferred candidates" or change "who is on the ballot, who can cast a vote, or when votes may be cast." State Br. 29-30. And at the conclusion of the election, all citizens would be free to "petition [their] representative, and access constituent services." *Id.* at 29. Thus, in the State's view, such a law would not be a "tangible restriction impacting individuals' ability to cast their votes effectively" and would not violate the First Amendment. *Ibid.* That cannot be correct.

The point is simple: If a State may not intentionally "burden[] the availability of political opportunity" using discriminatory filing deadlines (*Anderson*, 460 U.S. at 793); "dictate electoral outcomes" using ballot notations (*Gralike*, 531 U.S. at 523); or

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[2] The State says (Br. 57-58) that Dr. McDonald's vote dilution analysis falls short because he neither demonstrated polarized voting nor accounted for unaffiliated voters. That is wrong. See 3JA768-770 (Dr. McDonald finding that Republicans and Democrats engage in highly polarized voting); 2JA526-527 (Dr. McDonald explaining how he accounted for unaffiliated voters).

The State also repeatedly asserts (Br. 1-9, 23, 48, 56) that the district was made "competitive" by the gerrymander. But saying so does not make it so—and the evidence shows otherwise. See Appellants' Br. 12-20.

"interfere with [the] freedom to believe and associate" using patronage practices (*Rutan*, 497 U.S. at 76), neither may it intentionally do those things by manipulating district lines. And if the burdens are capable of rational judicial assessment in those other contexts, they are equally so in this one.

3. The State complains (Br. 30-31) that the district court's vote dilution standard is "more easily met" than the *Gingles* standard applicable to Section 2 claims. (Emphasis omitted). That ignores that the 1982 amendments to Section 2 "repudiated" the "intent test" applicable to race discrimination claims under *Mobile* v. *Bolden*, 446 U.S. 55 (1980). See *Thornburg* v. *Gingles*, 478 U.S. 30, 43-45 (1986). It is sensible than Section 2's effects-only test would call for a different analysis than a test that includes the "inordinately difficult" burden of proving intent. *Id.* at 44 (quoting Senate Report). For its part, this Court has reserved the question of how "intentional discrimination affects the *Gingles* analysis." *Bartlett* v. *Strickland*, 556 U.S. 1, 20 (2009) (plurality).

4. Some amici (but not Maryland) suggest that these burdens are nonjusticiable because they cannot be judged according to predetermined bright lines established by statistical metrics. *E.g.*, Wisconsin Amicus Br. 12; Freedom Partners Amicus Br. 26-27. But "as the branch whose distinctive duty it is to declare 'what the law is,' [this Court is] often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." *United States* v. *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring). "[I]t is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution" one case at a time. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 679 (1970). Thus, the Court

has never before required a universal "'litmus test' that would neatly separate valid from invalid" burdens as a precondition to exercising Article III jurisdiction in election-law cases. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality). It should not do so here.

B. The State concedes that the majority's change-every-election standard is wrong

We demonstrated (Appellants' Br. 40-43, 53-54) that the majority erred by inflexibly requiring plaintiffs to prove that the gerrymander flipped the Sixth District in 2012, 2014, and 2016 and that it will continue to control electoral outcomes in all future elections. We showed, in particular, that the majority's approach on this point is out of step with the opinion denying the State's motion to dismiss (*e.g.*, J.S. App. 104a, 106a) and would deny relief in many cases involving significant constitutional injuries.

The State now agrees. It affirmatively concedes (Br. 30) that, no matter how one conceives plaintiffs' burden in this case, the majority was wrong to "[draw] the line between tangible and intangible interests at the point where a seat changes hands." That is so, the State argues, because "[t]he circumstance that a group does not win elections does not resolve the issue of vote dilution." *Ibid.* (quoting *LULAC* v. *Perry*, 548 U.S. 399, 428 (2006)).[3]

There is no dispute on this point. As we have said repeatedly, vote dilution represents a constitu-

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[3] The State implies (Br. 18 n.11, 22, 47-48) that we invited this error. But as we explained in the opposition to the motion to affirm (at 1-2 & n.1), the sentence that the State cites for that proposition has been taken entirely out of context and twisted 180 degrees.

tionally cognizable burden when it produces any specifically intended, practical, adverse burden. See Opp. to Mot. to Affirm 1-2 (collecting citations). If the Court concludes that plaintiffs' First Amendment retaliation claim is justiciable, it should vacate the order below and remand for reconsideration of the motion for a preliminary injunction under the proper standard for burden.

C. Plaintiffs' claim neither outlaws politics in redistricting nor favors the status quo ante

1. The State asserts (Br. 27) that this Court's cases call inflexibly for "a manageable standard for courts to determine when partisanship 'has gone too far'" and accuse us of attempting to "eva[de]" that requirement. That is mistaken.

As we explained (Appellants' Br. 33-34), the "how much is too much" question arises only in challenges under the Equal Protection Clause, which asks whether mapdrawers have gone "too far" in their efforts to gerrymander—as though a little gerrymandering in just one district is okay, but extreme statewide gerrymandering is not. Again, the First Amendment approach is different; the distinction it draws is one of *kind*, not *degree*.

Thus, we cited (Appellants' Br. 47-48) a range of valid political considerations that may be taken into account under the First Amendment—considerations that do not require mapdrawers to single out citizens for disfavored treatment on the basis of their past protected conduct. These include avoiding contests between incumbents, respecting municipal boundaries and communities of interest, and allocating specific institutions to particular districts to preserve affinity relationships. The State cites it own examples. See State Br. 13.

We also explained that, even as to consideration of voter history and party affiliation, "'[t]he inquiry is not whether political classifications were used,' but 'whether political classifications were used [with the purpose and effect of] burden[ing] a group's representational rights." Appellants' Br. 48 (quoting *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring)). Simply put, the First Amendment would not require "extirpating politics" from an "essentially political" process. *Gaffney*, 412 U.S. at 754.

Maryland ignores our arguments on this score, insisting without explanation (Br. 19) that application of the First Amendment here "threatens to render *any* partisan motive fatal to redistricting." The 12 amici States take the same unreasoned approach, asserting (Br. 10) that "[a]pplying the First Amendment to partisan redistricting would outlaw any consideration of politics," but without addressing our arguments.

Freedom Partners at least acknowledge our position on this point, but they say (Br. 6) that the Court foreclosed any distinctions among political considerations in *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017). Not so. The Court in *Cooper* merely included "partisan advantage" in a catalogue of acceptable redistricting factors. *Id.* at 1464. That is entirely consistent with our point that most political considerations are acceptable, but deliberately targeting citizens on the basis of voter history and party affiliation is not.

2. The State asserts (Br. 32) that plaintiffs' claim rests on "the flawed premise that the preexisting map was constitutionally preferable" and elevates to preferred "constitutional status a prior district that is itself the result of partisan considerations."

That is unequivocally wrong. Those responsible for Maryland's 2011 redistricting were free under the First Amendment to dismantle and redraw the Sixth District however they liked, regardless of its pre-2011 character—so long as it was for a lawful reason. What they were *not* allowed to do is dismantle the Sixth District for the purpose of diluting Republican votes because of Republicans' past successful support of Roscoe Bartlett. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

To be sure, the legality of the pre-redistricting map may be implicated in some limited circumstances—but not in a way helpful to the State. For example, the deliberate maintenance of a prior gerrymander would be every bit as unconstitutional as the creation of a new one; deliberate *in*action can violate the First Amendment, too. See Appellants' Br. 47. Contra CLC Amicus Br. 23-24. In any event, the point is that the status quo is not entitled to any special weight under the First Amendment.[4]

The State is also wrong to say (Br. 43-44) that the decision below is inconsistent with the outcome in *Gaffney*. Accord CLC Amicus Br. 22-23. Although it is not a question presented here, a State's good faith effort "fairly to allocate political power to the parties in accordance with their voting strength" may well pass strict scrutiny. *Gaffney*, 412 U.S. at 754. In other words, narrowly drawn efforts to *undo*

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[4] The Campaign Legal Center proposes (Br. 20-29) several hypothetical scenarios in which the First Amendment supposedly fails to produce the results it prefers. But CLC's analysis is premised on the misconception that plaintiffs' injury inheres in Republican candidates' electoral losses in the Sixth District, rather than in the dilution of Republicans' votes that ensured those losses. It does not. See Appellants' Br. 36-43.

past partisan gerrymandering are not likely to violate the First Amendment. Of course, a State wishing to undo a past unlawful gerrymander will have several other tools at its disposal as well, including using earlier, non-tainted maps as a starting point or throwing out all prior maps and simply starting from scratch.

D. Plaintiffs proved specific intent

The State asserts (Br. 37-41) that courts cannot discern specific intent here because (1) the "secret ballot" prevents government officials from knowing how citizens have voted, and (2) it is impossible to determine the intent of a legislature in any event. Both contentions are meritless.

1. The State's suggestion that it is ignorant of voter history because of the "secret ballot" borders on absurd. State Br. 39. The defendants "aggregat[ed] address-level voter registration data, address-level voter history, and official election results in Maryland" for use in redistricting. 3JA656. They also made "available votes cast during early voting, on election day, and by absentee or provisional ballot at various levels of aggregation." 3JA659.

According to this data, which was given to the mapdrawers (1JA175; 3JA659), those responsible for the gerrymander could sort Maryland's nearly two thousand precincts based on voter history. In Frederick County's Precinct 02-017, for example—which covers just a few blocks in downtown Frederick—mapdrawers saw that there were 148 election-night votes cast for the Republican incumbent and 314 votes cast for his Democratic challenger in 2010. This precinct was kept *in* the Sixth District in 2011. But in Precinct 24-001, just a few blocks away, the count was 444 for the Republican incumbent and 339 for

his Democratic challenger. This precinct was moved *out* of the Sixth District in 2011.[5]

Data like this, reflecting voter history in small batches of citizens, is self-evidently sufficient to support a First Amendment retaliation claim. Indeed, courts often adjudicate allegations that the State has intentionally targeted groups of citizens rather than specific individuals, as they do in all racial gerrymandering cases. See, *e.g.*, *Cooper*, 137 S. Ct. at 1466; *Bush* v. *Vera*, 517 U.S. 952, 958 (1996) (plurality). "The fact that the State moved Republican voters out of the Sixth District * * * based on precinct-level data, and did not examine each voter's history" individually before taking "punitive action does not make its action less culpable under the First Amendment." J.S. App. 67a (Niemeyer, J.).

We made these points in prior briefing. See Opp. to Mot. to Affirm 9; Appellants' Br. 14. The State talks past them without rejoinder.

2. The State is also wrong that legislative intent in indeterminable. See State Br. 37-41. Inquiry into legislative intent is "common" and "makes up the daily fare of every appellate court in the country." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 861 (2005). It "is a key element of a good deal of constitutional doctrine," as with respect to Establishment Clause (*ibid.*) and Ex Post Facto Clause cases (*Smith* v. *Doe*, 538 U.S. 84, 92-93 (2003)).

So, too, is it a key element in racial gerrymandering cases. As the Court just recently confirmed in

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[5] Vote-history data is at elections.state.md.us/elections/2010/election_data/index.html and archived at perma.cc/W3VP-BRXZ. Frederick County's 2010 precinct map is archived at perma.cc/W83G-B86W.

Cooper, "[t]he plaintiff may make the required showing * * * of legislative intent" through either "direct evidence" or "circumstantial evidence of a district's shape and demographics, or a mix of both." 137 S. Ct. at 1464. The Court tellingly did not express any concern for the supposed unworkability of evaluating legislative intent in redistricting cases. See also NAACP Amicus Br. 15-17.

The Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968), which is not a First Amendment retaliation case, does not suggest otherwise. Indeed, the Court there reaffirmed that laws with "inevitable unconstitutional effect[s]," such as "the redrawing of municipal boundaries" to disenfranchise voters "for no reason other than" their race, are properly subject to challenge. *Id.* at 385. It rejected the First Amendment claim in that case because draft-card burning is not "inevitably or necessarily expressive," and Congress had alternative, legitimate grounds for the challenged law. *Id.* at 385-386. Moreover, this case concerns the core workings of our democratic processes; the Court's resolution of plaintiffs' claim in this special and narrow context need not predetermine the permissibility of claims challenging legislation in other contexts. Cf. State Br. 35-36 (citing cases).

Proving specific retaliatory intent in cases like this does not pose insurmountable practical problems either. Here, the record abounds with evidence (and it is frankly admitted by those who were responsible for the redistricting plan) that the goal was to dilute Republican votes to ensure "the election of another Democrat" in the Sixth District. 1JA44. This goal was confirmed time and time and time again. See, *e.g.*, 3JA661-665 (¶¶ 40-51) (stipulated public statements); 1JA107-108 (testimony of Eric Hawkins); 1JA236 (testimony of Sen. Robert Garagiola).

3. The State asserts (Br. 40-41, 49, 51-52) that intent is not provable in this case because of the later-occurring veto referendum. Not so.

The constitutional violation was complete at the time the State enacted the map; that the public later rejected a referendum challenging that action has no logical bearing on the intent underlying the legislature's original action. See *McCreary*, 545 U.S. at 866. That is especially so with respect to a public referendum; constitutional rights are counter-majoritarian precisely because they protect political minorities from the majority's overreach.

Besides, the referendum proves little: The ballot question was drafted so ambiguously that the State's expert, Dr. Lichtman, could not explain what it meant. Dkt. 177-49, at 174:22-175:10.[6] It would be difficult to read much into voters' "approval" of text so opaque that not even a redistricting expert can understand it.

E. Plaintiffs proved burden and causation

The State says (Br. 21, 41-42) that the causation element of the test "significantly complicates the problem of judicial manageability" because it turns on "speculation" about a "hypothetical state of affairs." That both misunderstands the First Amendment framework and confuses the burden and causation elements of the claim.

1. The question of *burden* requires a comparison of the status quo post with the status quo ante: Compared with the state of affairs before 2011, have

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[6] The ballot asked whether voters were "for" or "against" the following text: "Establishes the boundaries for the state's eight United States Congressional districts based on recent census figures as required by the United States Constitution." *Ibid.*

plaintiffs been placed at an identifiable political disadvantage by the gerrymandered map? The inquiry does not require the district court to conjure counterfactual maps or to imagine how elections might have turned out under them. See *supra*, pp. 9-11. Accord Wisconsin Amicus Br. 3 (plaintiffs' First Amendment claim "would not force courts to adjudicate the legality of maps based upon conjectural, statewide hypothetical states of affairs").

The majority below worried (J.S. App. 26a-28a) that the reversal of Republicans' political prospects in the Sixth District after 2011 may not have been attributable to the vote dilution visited by the complete reconfiguration of the district's lines, and therefore that the gerrymander's dilution of Republican votes may not have represented a burden at all. But as we explained in our principal brief (at 55), that concern depends on the implausible speculation that between 2010 and 2012, tens of thousands of historical Republican voters spontaneously abandoned their party and began supporting Democrats in each election thereafter.

That speculation "overlooks the obvious." J.S. App. 34a (Niemeyer, J., dissenting). The opposite conclusion—that the inversion of the political complexion of the district after 2011 is attributable to the gerrymander—depends not on speculation, but on rational, well-supported inference. "The difference between speculation and inference lies in the substantiality of the evidence constituting the premise." *Wisconsin Mem'l Park* v. *Commissioner*, 255 F.2d 751, 752 (7th Cir. 1958). Here, the premise underlying the inference is that the DPI and PVI are generally accurate and reliable measures of a party's electoral prospects because voters are relatively predictable from election to election—a fact sup-

ported in the record (1JA151-154; 4JA1107), uncontested by the State, and confirmed by the State's own expert (1JA259, 266-267). What is more, reasonable inferences do not require certitude: "[I]n law we speak in terms of the probability and likelihood that the premises buttress the conclusions," not certainty. *Wisconsin Mem'l Park*, 255 F.2d at 752.

Against this background, the majority's concern about mass defections from the Republican party independent of the gerrymander was not reasonably founded. Using the same tools that gerrymanderers themselves use—metrics like the DPI and PVI—we showed (Appellants' Br. 17-19) that it was the purposeful swapping of tens of thousands of Republican voters with tens of thousands of Democratic voters that eviscerated Republicans' political opportunity in the district after 2011.[7]

2. The *causation* element asks a different question: whether the vote dilution visited by the gerrymandered map would have come to pass even absent the mapdrawers' intent to burden voters on the basis of their voting histories and political-party affiliations. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 286-287 (1977). The mode of analysis on that point is identical to the analysis in any First Amendment retaliation case—it requires the State to prove that it would have drafted and adopted a map that cracked the Republican majority in the Sixth District independent of the specific intent to dilute Republican votes there.

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[7] Contrary to the State's assertion (Br. 49), therefore, "the official action" (dilution of votes) was also "the asserted injury" (infliction of concrete political disadvantage), just as in other First Amendment retaliation cases.

The State insists (Br. 49-55) that disproving but-for causation was not its burden to bear because the *Mt. Healthy* burden-shifting framework should not apply here. Its arguments are unpersuasive.

The State says first (Br. 51-52) that *Mt. Healthy* should not apply to partisan gerrymandering claims because there is "particularly attenuated causation" between the decision to dilute votes and the actual burden imposed. That is not what the evidence shows. Rank-and-file lawmakers were not involved in the drafting or approval of the map; rather, Democratic leaders explicitly directed mapdrawers the "to go for the Sixth" (1JA44) and thereafter presented the map as a *fait accompli*, jamming it through both houses and past the governor's desk in under three days (3JA660 (¶ 34)). There was no intervening deliberation by others—no independent check, like the prosecutor in *Hartman* v. *Moore*, 547 U.S. 250 (2006).

Hartman ultimately reflected a concern to protect government actors against claims that are easy to allege and difficult to disprove. In this case, the inverse obtains: Plausible partisan gerrymandering claims will be difficult to allege and—when there are genuine alternative explanations—easy for the State to disprove.

The State also asserts (Br. 55) that "[t]he named defendants, who merely administer elections, are in no better position than the plaintiffs to 'know[]'" of the possible alternative explanations for the map. The State raised that same meritless argument as part of its sustained refusal to cooperate in discovery; Chief Judge Bredar rightly rejected it. See *Benisek* v. *Lamone*, 320 F.R.D. 32, 36 (D. Md. 2017) (holding that the named defendants were able, and therefore

required, "to obtain documents and other information from the various state agencies and actors" involved in the redistricting).

Finally, the State cites an Equal Protection Clause case (Br. 53 (citing *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979)) for the proposition that its laws are entitled to a "presumption of validity." But this is a First Amendment case, and the *Mt. Healthy* burden-shifting framework comes into play only assuming that the plaintiffs have shown a specific intent to burden citizens on the basis of their protected expression. When a statute is unconstitutionally discriminatory like this, any presumption of validity is overcome. *Ibid.*

3. Regardless who bears the burden, causation is shown here. The State relies principally on its insubstantial "I-270" explanation for the decision to reconfigure the Sixth District. For support on this point, it cites (State Br. 7) a *Baltimore Sun* article (2JA486) and a state environmental impact study (4JA1052), but without any evidence that anyone actually had or considered either one of them; and "public testimony" concerning the "I-270 corridor" (2JA403-423), but without acknowledging that each person whose testimony is cited is a high-ranking Democratic Party insider with a vested interest in cracking the Sixth District. Cf. Dkt. 177-49, at 126:15-127:8 (Dr. Lichtman testifying concerning his experience with "sham explanation[s]" in racial gerrymandering cases).

The State also offers a series of unexplained citations to testimony in this case. State Br. 7-8. But the testimony comprises only a few artfully stated descriptions of the *effects* of the gerrymander, not its goals. As we explained in our principal brief (at 21),

all of the witnesses who were asked directly about the I-270 corridor flatly denied ever actually considering it during the mapdrawing process. The State does not deny this.

The State also points to Governor O'Malley's decision that the First District should not cross the Chesapeake Bay. State Br. 56. (citing 1JA44). But Dr. McDonald showed that it would have been possible (indeed, easy) to draw a map that accomplished that goal—and, indeed, respected *every single* other political consideration reflected the 2011 map—without diluting Republican votes in the Sixth District. 3JA786. He did so by altering the lines between the Sixth and Eighth Districts only. *Ibid.* We have referred to this alternative map on numerous prior occasions, but the State has not once bothered to acknowledge it, let alone respond.

F. The floodgates will remain closed

Wisconsin (but not Maryland) worries that holding Maryland's 2011 gerrymander to violate the First Amendment will "promptly spawn expensive and uncertain litigation" because it "will be trivially easy for plaintiffs to scrounge up an expert or two to testify to a more-than-de-minimis impact." Amicus Br. of Wisconsin 2-3. Cf. Texas Amicus Br. 14, *Gill* v. *Whitford*, No. 16-1161 (affirming claim will "invite[] massive judicial intervention").

That is wrong for two reasons.

First, the standard advocated here and adopted below "contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process." J.S. App. 105a. Among other things, it requires proof of specific intent; mere awareness of consequences is insufficient. *Id.* at 105a-106a. No matter the charac-

ter or magnitude of the burden asserted, there can be no relief if the burden was not purposely imposed in disapproval of voters' protected conduct. And even with respect to less substantial burdens that are specifically intended (scenarios that are candidly hard to imagine), the *Mt. Healthy* standard will protect States that would have drawn a map with the same effect either way. And come 2020, States presumably will abide a decision of this Court holding that legislatures may not deliberately burden voters because of their voting histories and political-party affiliations.

Second, in the absence of a standalone cause of action against partisan gerrymandering, citizens targeted by partisan gerrymanders are funneling their challenges through other causes of action, including racial gerrymandering claims under the Equal Protection Clause and racial vote dilution claims under Section 2 of the Voting Rights Act. See Appellants' Br. 45-46. This rerouting of partisan gerrymandering claims places counterproductive emphasis on race in redistricting and distorts and undermines clear and consistent enforcement of constitutional law. See generally Law Professors' Amicus Br. 6-30, *Gill* v. *Whitford*, No. 16-1161. It also means that approval of plaintiffs' claim is unlikely to encourage new litigation; it will, instead, lead litigants to continue to bring challenges, but under a more accurate and apt legal framework.

G. The Court cannot and should not affirm on alternative grounds

Citing cases that do not involve the abuse-of-discretion standard (Br. 55), the State insists that the Court can affirm on any ground apparent in the record. That is incorrect.

"[W]ith respect to a matter committed to the district court's discretion, [an appellate court] cannot invoke an alternative basis to affirm unless [it] can say as a matter of law that it would have been an abuse of discretion for the trial court to rule otherwise." *Manion* v. *American Airlines, Inc.*, 395 F.3d 428, 431 (D.C. Cir. 2004). This generally means that a reviewing court will not affirm "on any basis other than that articulated by the district court." *Parsi* v. *Daioleslam*, 778 F.3d 116, 126 (D.C. Cir. 2015). We made this point in the opposition to the motion to affirm (at 7), but the State again talks past our argument without response.

In any event, the State's alternative grounds are insubstantial. For the most part, the State rehashes its merits arguments (Br. 55-59), insisting that we failed to prove intent, causation, and burden—issues we have already addressed.

The State also cites our supposedly "extraordinary delay," faulting us for not filing for a preliminary injunction earlier and complaining that there is now inadequate time for relief. State Br. 59-60. But as we explained in the reply in support of the motion to expedite (at 2-3), seeking injunctive relief was not possible with respect to earlier elections because of the convoluted procedural history of the case. And a preliminary injunction became necessary with respect to the 2018 election only as a result of the State's own dogged refusal to cooperate in discovery. *Id.* at 3.

In any event, the question of delay and whether there is now adequate time for relief is a discretionary one for the district court in the first instance. It is assuredly still possible to correct the 2011 gerrymander in time for the 2018 elections—pursuant to

2 U.S.C. § 2a(c) if by no other means. See *Branch* v. *Smith*, 538 U.S. 254, 275 (2003) (plurality) (describing 2 U.S.C. § 2a(c) as "a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one").

CONCLUSION

The Court should vacate the order below and remand for further proceedings.

Respectfully submitted.

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